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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
Amendment of Section 73.658(k) of the Commission's Rules To Delete the "Off-Network" Program Restriction	)	RM No. ____
	)	Docket No. 94-123

To: The Commission

APPLICATION FOR REVIEW

Channel 41 Inc., by its attorneys, hereby requests Commission review of a recent decision by the Mass Media Bureau not to initiate rulemaking to delete the "off-network" program ban contained in Section 73.658(k) of the Commission's Rules and Regulations.[1] In support whereof, the following is respectfully stated:

Background and Introduction

On April 24, 1987, Channel 41, licensee of television station WUHQ-TV, Battle Creek, Michigan, petitioned the Commission to initiate a rulemaking to delete the "off-network" program ban. That provision prohibits network affiliates in the top 50 television markets from exhibiting during designated prime-time hours any programs formerly broadcast on national commercial networks.[2] This "off-network" ban is part of the

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[1] Petitioner files this request under 47 C.F.R. § 1.115.

[2] The four hours of prime time are 7-11 p.m. e.t. and (continued...)

Prime Time Access Rule ("PTAR").

In support of its petition, Channel 41 made the following principal points:

(1) The Commission adopted the "off-network" ban in 1970 as an appendage to PTAR but without a separate and adequate factual predicate. Since then, dramatic technological and marketplace changes have removed any significant factual support for the ban's continued existence;

(2) Its primary rationale was apparently to expand the market for first-run syndicators -- and thereby further reduce network influence -- by effectively forcing affiliated stations to buy and program non-network products. Tremendous growth in recent years among other first-run buyers, e.g., cable and independent stations, has totally vitiated this Commission rationale;

(3) Ironically, it was this Commission that initiated or promoted many of the non-PTAR forces that have transformed the video marketplace. These marketplace changes have rendered the "off-network" ban meaningless in terms of public policy -- except as a destructive, anti-competitive agent in individual local markets. The ban now harms local stations trying to choose the best programming to compete in a recharged market; and

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[2](...continued)
p.t., 6-10 p.m. c.t. and m.t. Unless an affiliate preempts the normal network schedule, the practical, ongoing effect of this ban is to prohibit the affiliate from broadcasting any so-called "off-network" programs of its own between either 6-7 p.m. or 7-8 p.m.

(4) Finally, because no defensible public-interest or practical basis exists for the ban, its continued enforcement by the Commission unconstitutionally intrudes on the First Amendment rights of local market affiliates.

Channel 41's April 24 petition did not ask the Commission to re-examine PTAR in its entirety, nor does Channel 41 make such a request now. Rather, as our petition clearly states, Channel 41 seeks to sever from the main rule the "off-network" provision, the only element of PTAR that operates as a direct restriction upon the specific programming choices of local affiliates. PTAR would continue to limit the amount of nationally-distributed, network-originated programming that such affiliates could "clear" during prime time. For the Commission's convenience, a full copy of Channel 41's rulemaking petition is attached.

On May 22, 1987, in a four-paragraph letter, the Chief of the Mass Media Bureau rejected Channel 41's petition.[3] Despite Channel 41's plain effort to limit the scope of the requested rulemaking, the Staff Decision referred to a proceeding to re-examine PTAR in its entirety, not just the "off-network" ban. The modification sought by Channel 41 would "deprive the rule of most of its effect," said the Staff.

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[3] Letter from James C. McKinney, Chief, Mass Media Bureau, to counsel for Channel 41 (May 22, 1987) (hereinafter "Staff Decision").

Commission Review Is Warranted

At least three separate grounds warrant Commission consideration of the questions presented.[4] First, by refusing to consider the constitutional validity of the "off-network" ban, the Staff ignored recent case precedent in conflict with the ban. Second, the dismissal results in perpetuating a policy that the facts show should be revised. Finally, the staff erroneously found that deletion of the "off-network" ban would necessarily and automatically "deprive the rule of most of its effect."[5]

Retaining the "off-network" ban conflicts with more than a decade of case law developed by the Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit.[6] As here, these cases have involved regulations where the government favors one type or source of speech over another. And, uniformly, they teach that government enhancement of the voices of some elements in society over others is "wholly foreign to the First Amendment."[7] By the "off-network" ban, the Commission has long favored "first-run" over "off-network" as the programming of choice on affiliated stations such as WUHQ during "prime time

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4 See 47 C.F.R. § 1.115(b)(2)(i), (iii) and (iv).

5 Staff Decision.

6 Buckley v. Valeo, 424 U.S. 1, 48-49 (1976); First National Bank of Boston v. Bellotti, 435 U.S. 765, 790-95 (1978); Home Box Office, Inc. v. FCC, 567 F.2d 9, 46-48 (D.C. Cir.) (per curiam), cert. denied, 434 U.S. 829 (1977); cert. denied, 106 S. Ct. 2889 (1986); Quincy Cable TV Inc. v. FCC, 768 F.2d 1434, 1451-52 (1985), cert. denied, 106 S. Ct. 2889 (1986).

7 Buckley, 424 U.S. at 48-49.

access." This governmental favoritism surpasses the incidental burdening of protected speech allowed under certain conditions by the First Amendment, particularly in the absence of any current factual or policy justification for the ban.[8]

When confronted with other FCC-imposed programming requirements bearing a striking similarity to the "off-network" ban, the D.C. Circuit found such requirements unconstitutional. In Home Box Office v. FCC, the court examined agency regulations limiting to certain classes the programming fare that cablecasters could offer viewers.[9] The regulations failed to pass constitutional muster, partly because the Commission had not "put itself in a position to know" whether its fears about the effect of one telecasting medium on another were "real or merely . . . fanciful."[10] Similarly, in limiting the classes of programming that top-50 affiliates may offer viewers, the Commission has refused to be informed about whether the ban is

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[8] An earlier court decision, Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971), upholding PTAR, was handed down prior to development of current doctrine that renders the "off-network" ban unconstitutional. Moreover, even if it can be said that the Commission and courts have previously considered the constitutional implications of the "off-network" restrictions specifically as they apply to local stations, at a minimum the drastically altered marketplace compels a fresh constitutional review.

[9] The court said the regulations could be valid only if they served a substantial governmental interest and were no more intrusive than necessary to serve that interest. Home Box Office, 567 F.2d at 48 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[10] Home Box Office, 567 F.2d at 50.

necessary to sustain first-run syndicators.[11] Thus, the "off-network" ban is a wholly unjustified assault on the First Amendment rights of top-50 affiliates to choose their own local programming.

The D.C. Circuit recently reaffirmed Home Box Office when it struck down yet another set of FCC regulations adopted to "bolster the fortunes" of one set of speakers over another. Quincy Cable TV v. FCC, 768 F.2d 1434, 1451 (D.C. Cir 1985). Given this recent judicial history, it is imperative that the Commission review and address the current constitutional implications of the "off-network" ban.

Two additional grounds warranting Commission review in this case are, in fact, intertwined. First, the Staff Decision sanctions continued enforcement of a policy that demands revision in light of drastically altered marketplace conditions. And second, the Staff Decision would leave that policy intact on the basis of an erroneous assertion regarding important and material questions of fact. Regarding the compelling, practical need to revise policy, Channel 41 already has demonstrated that the "off-network" ban is an unconstitutional, anti-competitive regulation that can inflate artificially prices for both first-run and off-

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[11] In 1981 Chronicle Broadcasting Co. petitioned the Commission to delete the ban, presenting evidence of a similar but also different nature than Channel 41. Petition for Rulemaking, RM-3951 (filed July 17, 1981). The Commission dismissed the petition on the basis it was awaiting staff recommendations on the questions at issue. Six years later, when presented with new and different evidence by Channel 41, the Commission still refuses to institute the rulemaking that would allow the agency to inform itself on this issue.

network programs. It also promotes the fortunes of syndicators whose markets have expanded rapidly and steadily since passage of the ban. Furthermore, the national networks whose influence the Commission sought to curb have seen a sharp drop in their prime-time audiences since passage of the "off-network" ban, thus undermining further any rationale for the restriction.[12]

Regarding the final ground for review -- the staff's erroneous assertion of material and important facts -- the record is clear. The "off-network" ban would not deprive PTAR of "most of its effect." The staff offered no support for this conclusory finding. There is none. In fact, the Commission clearly can delete the ban without obstructing its apparent policy objectives of lessening network dominance and encouraging alternative programming sources.

Both logic and pertinent facts suggest that local stations in the top 50 markets would continue purchasing significant amounts of first-run syndication -- without governmental compulsion. Many stations have captured substantial prime-time viewing audiences with such enormously successful first-run offerings as "Wheel of Fortune" and "Jeopardy."[13] There is no reason to believe they would abandon such proven, popular programming. Rather, the rule modification we request would allow market forces to determine whether affiliates would

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12 See attached "Petition for Rulemaking," p. 11-20.

13 See, e.g., "National Syndication Standings," Electronic Media at 33, (May 25, 1987).

(1) continue to purchase first-run syndication, (2) produce their own, local programming, or (3) schedule former network shows in the critical first hour of prime time. The access hour would, however, still be free of nationally-distributed, network-originated programming.

* * *

In refusing to institute rulemaking in this case, the Staff summarily dismissed Channel 41's proposal as unwarranted. The applicable rule gives the Commission discretion to dismiss rulemaking petitions "which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration . . . . "[14] The facts detailed in the April 24 petition and highlighted above, however, clearly demonstrate that none of the grounds for dismissal is applicable to Channel 41's proposed rulemaking.

Indeed, in the relatively few cases where the Commission has recently dismissed petitions as "unwarranted," the circumstances involved have been totally dissimilar to the instant case. Thus, in one case the Commission denied the petition after the petitioner failed to present any change in circumstances, providing the Commission no reason to reevaluate the rule.[15] In

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[14] 47 C.F.R. § 1.401(e). This 1980 amendment to Commission rules was intended to facilitate early disposition of clearly meritless petitions, not to allow peremptory rejection of meritorious petitions. In re Amendments to Part 0 and Part 1, 79 F.C.C. 2d 1 (1980) (rule amendment allows for dismissal of petitions without public notice and comment).

[15] In re Cable Television Syndicated Program Exclusivity (continued...)

sharp contrast, Channel 41 has presented new arguments and new facts and highlighted recent court precedent that the Commission has not heretofore considered in connection with the "off-network" ban. For example, the issues of local station competition and burgeoning outlets for "independent" programming were not before the Commission when it adopted the "off-network" ban in 1970. Accordingly, Channel 41 seeks to modify a rule designed to regulate conditions that do not currently exist.

Request for Relief

The Commission should proceed expeditiously to issue a Notice of Proposed Rulemaking outlining why current factual conditions, sound public policy and legal precedent require deletion of the "off-network" programming restriction from Section 73.658(k) of its Rules. "The rulemaking petition process exists, inter alia, to afford interested persons an opportunity to bring information to [the Commission's] attention which suggests that the underlying factual basis which led to the adoption of particular rules no longer exists."[16] This, we respectfully submit, is precisely what Channel 41's April 24

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[15](...continued)
and Carriage of Sports Telecasts, FCC 84-336 at ¶8 (released July 12, 1984) (The Commission found the petition "simply repeats issues considered at length recently"); see also, e.g., In re Petition to Amend the Amateur Rules to Make Certain Changes in the Volunteer Examination Program, FCC 85-45 at ¶1 (released Jan. 23, 1985) (petition dismissed because it raised no issues which "have not already been considered and either effected or rejected.")

[16] In re Petition for Rulemaking to Delete the Cable Television Mandatory Signal Carriage Rules, FCC 84-136 at ¶8 (released Apr. 6, 1984).

petition did. At a minimum, Channel 41 urges the Commission to address the key substantive points of its petition, such as whether the "off-network" ban is constitutional and whether it serves any public-interest purposes.

Conclusion

The Commission should trust market forces to create local programming schedules, not attempt to dictate such choices through an outdated regulatory ban. Accordingly, Channel 41 respectfully requests that the Commission conform its policy to contemporary reality by initiating a rulemaking proceeding to delete the "off-network" program restriction currently contained in Section 73.658(k).

Respectfully submitted,

CHANNEL 41, INC., WUHQ-TV

By: Willard W. Pardue Jr.

Carl R. Ramey
Willard W. Pardue, Jr.
of
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Its Attorneys

June 22, 1987

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.658(k)	)	RM No. ____
of the Commission's Rules To	)	Docket No. ____
Delete the "Off-Network"	)	
Program Restriction	)	

To: The Commission

PETITION FOR RULEMAKING

CHANNEL 41, INC.
WUHQ-TV
5200 West Dickman Road
Battle Creek, MI 49015

Carl R. Ramey
Willard W. Pardue, Jr.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Its Attorneys

April 24, 1987

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Executive Summary

In a major effort to lessen the perceived dominance of national networks in the early 1970's, the Commission enacted a set of far-reaching regulations. Among the best known is the Prime Time Access Rule ("PTAR"), adopted seventeen years ago after lengthy debate and a detailed study of the overall television industry. One discrete section of PTAR, however, was adopted without any study whatsoever. This section prohibits local affiliated stations in the 50 largest markets from broadcasting during non-network prime time any programs previously shown on national networks.

Over the years, this so-called "off-network" restriction has spawned an increasingly serious, detrimental impact on local station competition. It is this single aspect of PTAR, the "off-network" ban, that petitioner Channel 41 seeks to repeal. The restriction is a burdensome regulation lacking any justification in today's pro-competitive regulatory environment.

In this era, where promoting diversity of viewer choice is a virtue, the "off-network" ban is an anomaly. As a poorly thought-out appendage to PTAR, the "off-network" ban in fact undermines a primary goal of the broader rule, as stated by the Commission. That goal is to give local stations increased control in programming choices for their communities during non-network prime time. The "off-network" ban instead unfairly limits programming choices of affected stations, forcing important buyers from the market.

No valid reason exists to continue the "off-network" ban. Its primary goal appears to have been to promote the first-run syndication industry by providing a virtually guaranteed market. Whether circumstances ever justified such a patently unfair programming restraint on some local stations is now a moot point. Even the most casual observer of today's television marketplace is aware of the dramatic increases in outlets for first-run syndication, including independent stations and cable systems.

A double standard in programming restrictions no longer can be justified. As the Commission recently remarked upon launching its program-exclusivity proceeding, "[A]ny rule that applies to one type of program distributor should apply equally to all." Notice of Inquiry and Notice of Proposed Rule Making in Gen. Docket No. 87-24, FCC 87-65 at ¶44 released Apr. 23, 1987. We agree. The Commission should not sanction a rule that restricts program offerings of local network-affiliated stations, but not the offerings of local independent stations and cable outlets with which affiliates must directly compete.

Finally the "off-network" ban represents a particularly egregious and direct affront to the First Amendment rights of local stations. It impinges sharply on editorial discretion by restricting the programming choices of some local stations and not others. The Commission should remove this uniquely conspicuous and highly onerous restriction.

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In the Matter of	)	
	)	
Amendment of Section 73.658(k)	)	RM No. ____
of the Commission's Rules To	)	Docket No. ____
Delete the "Off-Network"	)	
Program Restriction	)	

To: The Commission

PETITION FOR RULEMAKING

Channel 41 Inc., licensee of Television Station WUHQ-TV, Battle Creek, Michigan, by its attorneys, herewith petitions the Commission to initiate a rulemaking proceeding to delete the "off-network" program restriction contained in Section 73.658(k) of its Rules and Regulations.[1] In support whereof, the following is respectfully stated:

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[1] Specifically, petitioner urges the Commission to rewrite Section 73.658(k) to read as follows:

> Commercial television stations owned by or affiliated with a national television station network in the 50 largest television markets shall devote, during the four hours of prime time (7-11 p.m. e.t. and p.t., 6-10 p.m. c.t. and m.t.), no more than three hours to the presentation of programs originated and distributed by a national network, other than feature films, or, on Saturdays, feature films . . . .

I.

Introduction and Summary

In pertinent part, Section 73.658(k) presently states that commercial television stations affiliated with a national television network in the 50 largest television markets "shall devote, during the four hours of prime time (7-11 p.m. e.t. and p.t., 6-10 p.m. c.t. and m.t.), no more than three hours to the presentation of programs from a national network [or to] programs formerly on a national network ("off-network" programs) . . . ."[2] In Channel 41's view, this rule creates two totally different and distinct regulatory restrictions. The first bars a local network-affiliated station from accepting and broadcasting more than three hours of prime-time programming originated (i.e., selected and distributed) by a national television network.

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[2] 47 C.F.R. §73.658(k)(1986)(emphasis added), known generally and in its entirety as the Prime Time Access Rule, or "PTAR." The remaining text of PTAR delineates certain categories of programming which are exempt from the general ban. For example, during the restricted hours, network affiliated stations may broadcast feature films -- except on Saturdays, when feature films are barred from the extra or fourth hour of prime time. In addition, the rule exempts six other types of network programming from the 3-hour limitation. Those six categories of favored programming are: (1) children's, public affairs or documentary programs; (2) on-the-spot news coverage; (3) regular network news broadcasts when immediately adjacent to an hour of local news or public affairs programming; (4) sports overruns; (5) certain live broadcasts that would meet the rule's restrictions in the Eastern and Central time zones but would run past the 3-hour limit in the Mountain and Pacific zones; and (6) certain sports and special programs.

The second restriction, and the sole subject of this petition, bars a local network-affiliated station from purchasing from non-network sources and broadcasting in designated prime-time hours certain program material that was formerly on a national network.

In other words, WUHQ-TV, an affiliate of the ABC Television Network, is not only prohibited from accepting more than three hours of prime-time programming originated by ABC on a daily basis, it is prohibited from scheduling, on its own station and in its own market, any additional programming during the four-hour time period designated by Section 73.658(k) as prime time -- if that programming had any former network life. Thus, even a series such as "I Love Lucy," which appeared on CBS nearly three decades ago, is still denied to WUHQ-TV in prime time (if it broadcasts three hours of programming originated by ABC).

Channel 41 believes this "off-network" programming restriction is a patently unfair intrusion into the program decision-making process of network affiliates in the top-50 markets that directly inhibits their competitive position. Even if the "off-network" restriction were ever justified, which we doubt, it remains a curious regulatory relic for a Commission that has taken so many important steps to enhance free and open competition and to promote unfettered licensee choice in the selection and scheduling of program material.

The "off-network" restriction originated as part of a larger package of regulatory reforms designed to curb the perceived programming dominance of national networks in an era when there were far fewer competitive outlets. In practice, however, the restriction has become a local anti-competition rule -- directly restricting stations such as WUHQ-TV from competing effectively in their own markets. The restriction must, therefore, be removed.

First, the "off-network" clause was added to PTAR without benefit of an adequate factual record or discernible policy rationale. It was, in fact, first mentioned and formulated at the very last stages of an exhaustive rule-making proceeding that focused almost entirely on other matters.

Second, even if the "off-network" restriction could have been justified nearly two decades ago, the ban lingers long after any possible justifications have disappeared. The explosive growth in the number of independent stations in the top-50 markets, the introduction and expansion of other competitive outlets such as cable television, and the growth and enhanced vitality of first-run syndication as an attractive alternative to "off-network" syndication have transformed the "off-network" ban into the anti-competitive regulation it is today. Instead of fostering any conceivable public-interest purpose, the ban directly impedes WUHQ-TV from purchasing and airing any type of programming that was

previously broadcast by any national network. At the same time, however, the "off-network" ban affords full programming discretion to some of the stations with which WUHQ-TV must directly compete.

Finally, this blanket restriction, whose regulatory justification has always been suspect at best, represents a direct affront to the First Amendment rights of local broadcasters to select and schedule programming without governmental restraint.

II.

The "Off-Network" Ban Was Adopted Without Factual Support and Remains Unsupported Today

Before adopting the "off-network" ban in 1970, the Commission failed to establish a separate factual predicate for this distinct appendage to the basic PTAR concept. The Commission simply speculated that allowing local stations to purchase and schedule any former national programming in prime time "would destroy the essential purpose of the rule to open the market to first-run syndicated programs."[3] The FCC did not examine whether first-run syndication might flourish without imposing this particular programming restriction, nor did it examine any other relevant competitive questions.

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[3] Report and Order, 23 F.C.C.2d 382, 395 (1970); see also Second Report and Order, 50 F.C.C.2d 829, 848 (1975).

were to lessen network domination of both station operations and prime-time television and to open prime time to independent producers and first-run syndicated series.[6]

The Commission articulated a somewhat broader PTAR rationale several years later. For example, in 1975, while reaffirming its belief that the rule would help "lessen network dominance," the Commission also expressed a new justification. It declared that PTAR freed a portion of valuable prime time during which licensees could "present programs in light of their own judgments as to what would be most responsive to the needs, interests and tastes of their communities."[7]

While this explanation may have some relevance to the basic thrust of PTAR (to limit the amount of prime-time programming supplied by national networks), it also stands as

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[5](...continued)
time to sources of new non-network materials." 50 F.C.C.2d at 848.

While PTAR is, of course, written for regulatory convenience as a direct restriction against local, affiliated stations devoting more than a set amount of prime-time programming to programs received <u>from</u> a national network, there is no dispute that the regulation is, in fact, directed against national networks so as to limit the amount of prime-time programming they <u>offer</u> or distribute to affiliated stations in the top-50 markets.

[6] That rulemaking was part of a larger proceeding that directly limited the ability of national networks to syndicate programming and to maintain financial interests in network programming. 47 C.F.R. §73.658(j) (1986).

[7] 50 F.C.C.2d at 835.

yet another instance where the Commission has failed to justify the separate existence of the "off-network" ban. Indeed, on its face, this 1975 rationale directly contravenes the only practical consequence of the "off-network" restriction -- to restrict the program choice of local affiliates.

If the Commission truly desires to permit licensees in these markets to present programs based on their own judgments as to what would be "most responsive" to the "interests and tastes of their communities," it will free local affiliates in top-50 markets from the heavy hand of the "off-network" program restriction. In short, based on the Commission's own most recent rationale, there can be no regulatory justification for the restriction. It permits a local independent station or a cable outlet, each competing with WUHQ-TV, to program "Gimme a Break" or "Cosby" at 7:30 p.m. but restricts WUHQ-TV's ability to make the same local programming choice. Other top-50 affiliates face the same quandary.

In the late 1970's, the Commission created a Network Inquiry Special Staff ("Special Staff") to study certain network-related matters, including PTAR. In 1980, the Special Staff concluded that the "off-network" ban, as expected, had effectively dedicated a more lucrative time

limitations,[14] but the Commission dismissed the petition, saying it was awaiting recommendations of its then Broadcast Bureau on the Special Staff's report. Six years later, no proceeding concerning the "off-network" ban has resulted from the Special Staff's report.[15]

Dismissal of the Chronicle petition, and subsequent inaction, came despite promises from the Commission to re-examine various aspects of PTAR in light of changed circumstances. For example, recognizing the uniquely speculative nature of its regulations in this area, the Commission specifically declared: "If we are mistaken in any respect, we have stated our intention to follow developments and take any remedial action that may be necessary."[16]

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[14] Petition for Rulemaking, RM-3951 (filed July 17, 1981).

[15] The Commission has, of course, attempted to address the financial interest and syndication restrictions of Section 73.658(j) during this time period. 94 F.C.C.2d 1019 (1983). But these matters involve issues which, again, we submit, are totally separate from the continued impact of the "off-network" restriction on local stations.

[16] 23 F.C.C.2d at 401; see also, e.g., Report and Order, 44 F.C.C.2d 1081, 1138 (1974). The programming record up to that time did not warrant "the complete restraint on network and off-network programming which the present rule provides . . . ." Still, the Commission felt the rule had "not yet had a fair test to determine its predicted potential . . . ." Id.

Courts upholding PTAR also have noted its experimental nature and emphasized the necessity of re-examining its legality if the rule proved inimical to the public interest. See, e.g., National Ass'n of Indep. Television Producers and Distribs. v. FCC, 516 F.2d 526 (2d Cir. 1975). "If time and

(continued...)

III.

Sweeping Changes in the Marketplace Have Eliminated Whatever Justifications Might Have Existed for the "Off-Network" Ban

As noted[17], Channel 41 previously has requested ad hoc relief from the severe competitive disadvantages placed upon it by the "off-network" ban. However, in light of the substantial marketplace changes which have taken place in recent years, Channel 41 now believes that the case for outright repeal of the "off-network" ban is the most compelling.

Indeed, only this month the Commission reaffirmed its belief in a pro-competitive regulatory approach to broadcasting -- an approach contrary to restraints such as the "off-network" ban. In its NPRM regarding syndicated exclusivity, the Commission said; "The public's long-run interests, we believe, will best be served by facilitating a competitive market that is not skewed in favor of any competitor."[18]

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[16](...continued)
changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." Id. at 535, quoting NBC v. United States, 319 U.S. 190, 225 (1943).

[17] See note 13, supra at 9.

[18] Notice of Inquiry and Notice of Proposed Rulemaking (continued...)

In the NPRM, the Commission emphasized its aversion to tilting the rules in favor of some players in the video marketplace. "[A]ny rule that applies to one type of program distributor should apply equally to all."[19] The goal is "fair competition on a level playing field that this Commission has attempted to provide in all of its industry regulation."[20] Among the players are independent stations, now "major competitors in many markets" and helping fuel significant changes in the video marketplace.[21]

In our view, therefore, the Commission already has established the policy framework supporting repeal of the "off-network" ban. Detailed below is additional evidence demonstrating why no justification exists to continue the ban.

A. Dramatic Increases in the Number of Independent Stations, Huge Increases in the Amount of First-Run Syndicated Programming, and the Proliferation of Cable Systems Undercut Prior Rationales

When PTAR and the "off-network" ban were first adopted, WUHQ-TV had not yet commenced operations. In 1971, when

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[18](...continued)
in Gen. Docket No. 87-24, FCC 87-65 at ¶24 (released Apr. 23, 1987) (emphasis in the original).

[19] Id. at ¶44.

[20] Id. at ¶24.

[21] See Id. at ¶44.